

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of EDMOND POSEY, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANITA POSEY,

Respondent-Appellant.

UNPUBLISHED

August 23, 2005

No. 260532

Oakland Circuit Court

Family Division

LC No. 03-677200-NA

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(g), (h), (j), and (n)(i). We affirm.

Respondent is currently serving a term of seventeen to fifty years' imprisonment for her conviction of second-degree murder. Shortly after respondent was imprisoned her adult son and his spouse were appointed guardians of the minor child, who had been removed from the home of his father on suspicion of physical abuse. When similar allegations of abuse by the guardians arose, petitioner sought temporary custody of the minor child through a complaint and petition alleging abuse and neglect by the guardians. Finding a sufficient factual basis to support these allegations the trial court authorized the petition and took temporary custody of the child, without notice of the petition or any subsequent proceedings thereon provided to respondent.

After the guardianship of respondent's adult son and his spouse was voluntarily terminated, it was recommended by petitioner that the minor child be placed with his paternal grandmother upon successful completion of residential behavioral programming. A supplemental petition to terminate the parental rights of both parents, a copy of which was served on both respondent and the child's father, was thereafter filed by petitioner. Following the appointment of counsel for respondent, a trial on the issue of jurisdiction was held before a jury. On the basis of the evidence offered at that trial, including the abuse suffered by the child at the hands of his father and guardians, and the circumstances of respondent's incarceration, the jury concluded that statutory grounds for jurisdiction over the child had been shown. Relying on this same evidence, the trial court found each of the allegations in the supplemental petition to have been clearly and convincingly proven, and that termination of respondent's parental rights was, therefore, appropriate. At a subsequent hearing, whereat respondent offered testimony

concerning the likelihood of her receiving gubernatorial clemency, the trial court concluded that termination of respondent's rights was not clearly contrary to the best interests of the child. Respondent thereafter filed the instant appeal, challenging the termination of her parental rights on a number of grounds.

Respondent first argues that because she was not provided notice of the petition seeking temporary custody of her minor child, the order terminating her parental rights must be reversed. We disagree.

Respondent is correct that, as the parent of a child who was the subject of a child protective proceeding, she was entitled to notice of the petition and of the time and place for any hearings regarding that petition. MCL 712A.12; see also MCR 3.920(B)(2)(b). Respondent is also correct that this Court has reversed orders terminating parental rights where the notice required by MCL 712A.12 was lacking or otherwise deficient. See, e.g., *In re Atkins*, 237 Mich App 249; 602 NW2d 594 (1999); *In re Brown*, 149 Mich App 529; 386 NW2d 577 (1986). However, because respondent failed to preserve this issue by raising the argument below, respondent is entitled to such relief only upon a showing of plain error affecting her substantial rights, i.e., error that affected the outcome of the proceedings. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). We find no such error on the facts of this case.

As argued by petitioner, although failing to provide respondent with notice of the petition and associated proceedings involving the child's guardians, the proceedings were, in essence, reinitiated and litigated in full upon the filing of the supplemental petition seeking to terminate the parental rights of both parents, notice of which respondent does not dispute. Like the original petition, the supplemental petition alleged that the child came within the jurisdictional provisions of MCL 712A.2, and was authorized by the trial court after a preliminary hearing at which counsel for respondent was present. At respondent's request the jurisdictional aspects of the supplemental petition were then adjudicated by way of a jury trial, during which respondent was afforded the opportunity to oppose the grounds alleged to support jurisdiction over the child and termination of her parental rights.¹ Although respondent questions on appeal the legal basis for reinitiating the proceedings in this manner, respondent fails to argue or even assert that had she been earlier afforded such opportunity through notice of the original petition, the outcome of the proceedings on the supplemental petition to terminate her parental rights would have been different. Given this failure, and considering the notice and opportunity to be heard ultimately afforded respondent, relief on the basis of a deficiency of notice regarding the initial petition

¹ We find no merit to respondent's assertion that because the child was residing outside Oakland County at the time of this trial, jurisdiction over the child could not be properly obtained by the Family Division of the Oakland Circuit Court. As noted by petitioner, because the offense on which the original petition was premised occurred while the child was residing with his guardians in Oakland County, the child was considered to be "found within" that county for purposes of MCL 712A.2. See MCR 3.926(A). That the child was subsequently placed by petitioner outside that county does not alter that result. See MCR 3.926(B)(3); see also *In re BZ*, 264 Mich App 286, 291-293; 690 NW2d 505 (2004).

concerning the child's guardians is neither warranted nor required under the circumstances of this case. *Carines, supra*.

Respondent also argues, however, that the trial court's order terminating her parental rights must nonetheless be reversed because the court failed to make sufficient findings of fact and conclusions of law regarding the grounds for termination of her parental rights, as required by MCR 3.977(H). Again, we disagree.

Pursuant to MCR 3.977(H)(1), "[b]rief, definite, and pertinent findings and conclusions on contested matters are sufficient." Here, following pronouncement of the jury's determination regarding jurisdiction, counsel for petitioner argued that the evidence presented before the jury also clearly and convincingly established one or more of the statutory grounds for termination of respondent's parental rights alleged in the supplemental petition. See MCR 3.977(E). After indicating that it would take judicial notice of the testimony and evidence presented at the jury trial over which it had presided, the trial court found that "in light of the circumstances of [respondent's] incarceration, as well as the evidence presented," petitioner had proven the allegations set forth in the supplemental petition by clear and convincing evidence.² Although respondent correctly notes that the trial court did not specifically address any one of the statutory grounds alleged in the petition, we nonetheless conclude that the trial court's findings were sufficient to satisfy the requirements of MCR 3.977(H). See, e.g., *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995) (findings of fact are sufficient if it appears that the trial court was aware of the factual issues in the case and correctly applied the law). Indeed, with respect to respondent, the primary issue in this case was her inability to care for and protect her child before, during, and (in the event of clemency) after her incarceration. See MCL 712A.19b(3)(g), (h), (j), and (n)(i). It is apparent that the trial court was aware of the contested factual issues in the case, which it resolved in favor of petitioner. *Triple E Produce, supra*. Consequently, we reject respondent's assertion that reversal of the trial court's order terminating her parental rights is required for failure to meet the requirements of MCR 3.977(H).

We similarly reject respondent's assertion that the trial court clearly erred in later determining that termination of respondent's parental rights was not contrary to the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Although respondent presented evidence of possible clemency and a continued bond between herself and her child, the trial court's inquiry into the best interests of the child clearly revealed that the child's immediate need for stability and consistent care outweighed any benefit derived from the speculative probability of reunification through clemency. Moreover, as found by the trial court, while respondent had demonstrated an ability to maintain employment and housing sufficient to sustain herself and her child should she in fact be granted clemency, her history of "other parental care" militated strongly in favor of a conclusion that a delay in

² It is clear from the record that each party understood that a dispositional hearing, whereat the trial court would consider the testimony and evidence presented to the jury and render a decision regarding the allegations set forth in the supplemental petition, would immediately follow the jury's determination regarding jurisdiction.

termination of respondent's parental rights would be both fruitless and contrary to the best interests of the child. Given such facts, we do not conclude that the trial court erred in determining that termination of respondent's parental rights was not clearly contrary to the child's best interests. *In re Trejo Minors, supra*.

Finally, we find no merit to respondent's claim that she was denied her right to the effective assistance of counsel in the proceedings below. With respect to the complaint and petition regarding the child's guardians, we note that respondent was not entitled to the appointment of counsel to represent her in the proceedings related thereto because she was not, at that time, a "respondent" within the meaning of MCR 3.903(C)(10) and MCR 3.915(B)(1)(i). Moreover, although respondent alleges various deficiencies in the performance of counsel later appointed to represent her with respect to the supplemental petition, to prevail on a claim of ineffective assistance of counsel a respondent must show not only that counsel's representation was deficient, but also that there is a reasonable probability that in the absence of such deficiency the result of the proceedings would have been different. See *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002). Here, however, respondent fails to allege or otherwise explain how the claimed deficiencies in the performance of her counsel prejudicially contributed to the trial court's ultimate decision to terminate her parental rights and has thus failed to meet her burden of establishing ineffective assistance of counsel. *Id.* Nonetheless, our review of the record demonstrates that counsel was a zealous and effective advocate for respondent throughout the proceedings. Although counsel did not directly challenge the statutory grounds for termination alleged in the supplemental petition, he fervently argued that, given the strong bond between respondent and the child and the pendency of respondent's petition for clemency, termination on those grounds was clearly contrary to the best interests of the child – a contention that, although ultimately rejected by the trial court, was found by the court to have been "well put." Moreover, because the failure to provide respondent notice of the proceedings regarding the child's guardians was not, as previously discussed, error determinative of the outcome of the later proceedings to terminate respondent's parental rights, counsel's failure to raise that issue before the trial court did not render his assistance ineffective. Consequently, we reject respondent's claim that she was denied the effective assistance of counsel and affirm the trial court's order terminating her parental.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey